ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SARAH J. HEFFLEY, JUDGE

DIVISION IV

CA CR 06-1027

August 29, 2007

JAMES HAROLD GIST, JR.

APPELLANT

APPEAL FROM THE CIRCUIT COURT OF GARLAND COUNTY
[NO. CR-05-620-1]

V.

HONORABLE JOHN HOMER WRIGHT, JUDGE

STATE OF ARKANSAS

APPELLEE

AFFIRMED

In a bench trial, appellant James Harold Gist, Jr., was found guilty of driving while intoxicated (first offense), refusal to submit to a breathalyzer test, and careless and prohibited driving. Appellant was sentenced cumulatively to one day in jail, his driver's license was suspended for six months, and he was fined $100. In lieu of jail time, appellant was allowed to complete twenty-four hours of community service within ninety days. Appellant argues for reversal that the trial court abused its discretion by allowing testimony concerning his performance on the horizontal gaze nystagmus test and by permitting testimony that was based on speculation. We find no error and affirm.

On New Year's Eve 2004, Corporal Dennis Overton of the Arkansas State Police was on

patrol on Highway 7 near the intersection of Amity Road. While sitting at a service station, he observed appellant's vehicle veer onto the shoulder of the road, do a U-turn, and accelerate at a high rate of speed, squealing his tires and kicking up gravel as he accomplished this maneuver. Overton then initiated a traffic stop. He immediately noticed that appellant's eyes were red and glassy, and he detected the strong odor of intoxicants coming from appellant's person. Overton testified that he conducted four field sobriety tests and that appellant performed satisfactorily only on one of them, the alphabet test. Otherwise, appellant failed the horizontal gaze nystagmus test, the one-leg stand, and the nine-step-and-turn test. Appellant also refused a portable breathalyzer, and he refused to take a breathalyzer test at the station. In his testimony at trial, appellant stated that he had consumed three beers and a shot of whiskey in the four hours preceding the stop.

Appellant's first argument concerns the objection he raised when Corporal Overton testified that the involuntary jerking of the eye during a horizontal gaze nystagmus test indicated "a level of intoxication of point one [zero] or above." Appellant contends that the officer's testimony was not admissible under the decision in *Middleton v. State,* 29 Ark. App. 83, 780 S.W.2d 581 (1989). In that case, we held that there was no evidentiary foundation laid for testimony that a positive gaze nystagmus test indicated an alcohol level in excess of .10. In subsequent decisions, our courts have held that the gaze nystagmus test is a valid indicator of the presence of alcohol, but we have maintained disapproval when the test is used to fix a percentage of blood-alcohol content. *Whitson v. State,* 314 Ark. 458, 863 S.W.2d 794 (1993); *Brown v. State,* 38 Ark. App. 18, 827 S.W.2d 174 (1992).

In addressing appellant's objection, the trial court stated, "Of course, the way I'm gonna hear it is it's a field sobriety test. It's not a breathalyzer type result. I don't ever accept the testimony in

that regard. I mean, we know that that's not what it's designed for and that's not what it means." It is clear to us that the trial court sustained appellant's objection, agreeing with him that the gaze nystagmus test was not to be used to indicate a specific blood-alcohol content. We thus find no error. One cannot complain about a favorable ruling granting all the relief requested. *Dixon v. State,* 310 Ark. 460, 839 S.W.2d 173 (1992).

Appellant's second issue also involves an evidentiary objection that was made during Corporal Overton's testimony. There was a bar called Three Card Charlie's[1] 300 feet from where Overton was positioned at the service station. Overton said there were three or four men standing out front who were yelling at appellant after appellant made the U-turn. Overton testified that, as he pulled out of the parking lot, a man "working security or whatever came running out towards the road, pointing and yelling and pointing that direction, as in that's him, or they were saying go get him, that type of thing." Appellant argues that the officer's testimony was speculative and was not based on his personal knowledge. We disagree.

Rule 701 of the Arkansas Rules of Evidence permits lay witnesses to testify in the form of opinions or inferences, as long as those opinions or inferences are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue. It is well-settled that Rule 701 is not a rule against opinions, but one that conditionally favors them. *Bridges v. State,* 327 Ark. 392, 938 S.W.2d 561 (1997). The decision on whether to admit such evidence rests in the sound discretion of the trial court, and the

[1] In his testimony, appellant related that he had been denied entry to this bar because he refused to pay the $5.00 cover charge. Appellant explained that he had only wanted to go inside long enough to see if a co-worker was there, and that he had called for the manager in his unsuccessful attempt to enter the bar without paying the charge.

trial court's ruling will not be reversed absent an abuse of discretion. *Marts v. State,* 332 Ark. 628, 968 S.W.2d 41 (1998).

Here, the inference drawn by the officer was based on his personal observation of the antics of the bystanders, who were yelling and pointing in the direction of the appellant who had just made a U-turn and spun out in his car. We find no abuse of discretion. *See Tillman v. State,* 275 Ark. 275, 630 S.W.2d 5 (1982) (trial court properly admitted an officer's opinion that a car had backed out of a driveway, where the officer's observations as to the car's position relative to the driveway provided a rational basis for the opinion). Nor do we perceive any prejudice resulting from the admission of this testimony. Although appellant claims that he was harmed by testimony that the crowd prompted Overton to apprehend him, our reading of the officer's testimony is that he saw the bystanders gesticulating "as [he] pulled out of the parking lot." In our view, Overton stopped appellant because of his erratic driving, not because the crowd urged him to do so. Moreover, the basis for the stop was not at issue, since appellant made no claim that the stop was unlawful. We will not reverse a conviction for an error which is unaccompanied by prejudice. *Richmond v. State,* 302 Ark. 498, 791 S.W.2d 691 (1990).

Affirmed.

BIRD and MARSHALL, JJ., agree.